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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 320

DANIEL O'DONNELL,

Petitioner,

vs.

GREAT LAKES DREDGE AND DOCK COMPANY,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

WALTER F. DODD,
Attorney for Petitioner.

EARL J. WALKER,
Of Counsel.

THE LAKESIDE PRESS, R. R. DONNELLEY & SONS COMPANY, CHICAGO

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PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petitioner, Daniel O'Donnell, a seaman, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Statement of the Matter Involved.

But one issue is presented to this Court—that as to the application of the Jones Act to a seaman "who shall suffer personal injury in the course of his employment" on the shore. (U. S. Code, Title 46, Sec. 688.) Section 33 of the Merchant Marine Act of 1920, amending section 20 of the Seaman's Act of 1915, usually termed the Jones Act, applies the Federal Employers' Liability Act to any seamen suffering injury "in the course of his employment" and the injury to O'Donnell in this case was "in the

course of his employment" as a seaman, even though on land.

There is no question as to O'Donnell's being a seaman nor as to his injury in the course of his employment as a seaman. And the facts also clearly show that he was engaged in interstate commerce.

The petitioner, Daniel O'Donnell, on and prior to August 8, 1940, was a seaman employed as a deckhand and member of the crew upon the steamship "Michigan," owned and operated by the respondent, Great Lakes Dredge and Dock Company. The District Court found as a fact that the respondent was "engaged in transporting cargoes of sand from Indiana waters to Lincoln Park, Illinois, over waters of Lake Michigan, being navigable waters of the United States" (R. 10). The sand was unloaded from the hatches of the vessel by machinery, through a long conduit or pipe permanently attached to the vessel, which swung over the side of the vessel to a staging above the water while unloading, and the other end of the conduit was connected to land pipes by means of a large, heavy gasket, approximately thirty-six inches in diameter. Prior to the accident, the petitioner had been working upon the vessel as a member of the crew, but on the evening of August 8, 1940, the gasket above referred to, which secured the vessel conduit to the shore pipes, became detached and large quantities of sand and water being unloaded from the vessel shot out from between the ends of the pipes; whereupon the captain of the vessel ordered O'Donnell, the petitioner, to assist others on the shore in an emergency repair of the gasket. While the petitioner was thus engaged in the course of his employment under the directions of the master of the vessel, a large counterweight on the gasket fell upon the petitioner and he thereby sustained personal injuries (R. 3). There is no disagreement as to these facts, the only fact at issue below being that as to the extent of the injuries (R. 7).

The petitioner brought an action against respondent in the United States District Court, basing the first count upon the Jones Act for negligence, and two other counts upon the right to maintenance, cure and wages. Upon motion of respondent to dismiss the cause, the District Court dismissed the cause as to Count I for want of jurisdiction, and overruled as to Counts II and III. Upon Counts II and III, no answer was filed by respondent (R. 7), but evidence was taken as to the amount of disability, and a decree was entered for the sum of $275.

On appeal by petitioner, the United States Circuit Court of Appeals, by judgment entered May 22, 1942, sustained the dismissal of the first count by the District Court; reversed the judgment of that Court under Counts II and III; and ordered the cause remanded with directions to enter a judgment for petitioner upon principles stated by that Court with respect to wages, maintenance and cure (R. 19-20).

Petitioner's right to an admiralty remedy of maintenance and cure was set out in Counts II and III of his complaint (R. 4-5), and was fully recognized by respondent and by the lower courts in the present case; but relief was denied to him under the Jones Act on the ground that admiralty jurisdiction limits that act to injuries on navigable waters.

The judgment of the Circuit Court of Appeals sustaining the dismissal of petitioner's first count for want of jurisdiction is a final decision as to that issue, and denies petitioner any rights to relief under the Jones Act. This is the only issue presented by this petition.

This Court Has Jurisdiction.

This case involves "an important question of federal law, which has not been, but should be, settled by this Court" (Supreme Court Rule 38, par. (5) (b)). This Court has never decided that a seaman injured on land

"in the course of his employment" is denied the remedy accorded by the Jones Act to "any seaman who shall suffer personal injury in the course of his employment." It is true that a mass of decisions of District Courts and Circuit Courts of Appeal have limited the application of this remedy to injuries incurred on navigable waters. And it is further true that this Court, in *Crowell* v. *Benson*, 285 U. S. 22, 55, unnecessarily stated, with respect to a statute specifically limiting itself to injuries on navigable waters, that admiralty and maritime jurisdiction was constitutionally so limited. There are other unnecessary statements by this Court to the same effect. It is because of these decisions and dicta that the Circuit Court of Appeals said in the present case that "unfortunately" they were not free to agree with an opposing view. Such an issue is for determination by this Court.

Statements heretofore made by this Court and by inferior federal courts are not controlling. The Court is here faced with a situation similar to that in *United States* v. *Evans*, 195 U. S. 361, where it disregarded dicta of this Court and a number of decisions of inferior federal courts, and abandoned "the distinction between damage done to fixed and to floating structures", saying, through Mr. Justice Holmes, that "the constitution does not prohibit what convenience and reason demand."

Nor should jurisdiction be denied because there is no final judgment as to the amount of recovery for care, maintenance and wages. There is a final denial of remedy under the Jones Act, and this is the only issue here presented. The dismissal of the first count of the complaint by the District Court and the affirmance of such dismissal by the Circuit Court of Appeals are in a sense interlocutory, in that other features of the case are not disposed of, but there can be no further proceedings under the Jones Act in either of these Courts. This Court has explicit authority to review by certiorari "either before or after

a judgment or decree by such lower Court" (U. S. Code, Title 28, sec. 347); and it has properly allowed the writ of certiorari where to deny it would merely protract litigation. *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 121.

The Question Presented.

Congress has power and has exercised the power to authorize the maintenance of an action for damages at law by "any seaman who shall suffer personal injury in the course of his employment", wherever that course of his employment may lead him.

Reasons Relied Upon for Allowance of Writ.

(1) The intent of the act of congress was to apply the Jones Act to injuries to seamen in the course of their employment, irrespective of the place where the injury may have been incurred.

(2) So to construe the act does not transcend the power of congress which may be necessary and proper for carrying into execution the judicial power with respect "to all cases of admiralty and maritime jurisdiction." The constitutional grant of admiralty and maritime jurisdiction to the federal courts does not forbid congressional provision of a remedy both in federal and state courts for seamen injured in the course of their employment, wherever that employment may be. In the present case it is clear that recognized admiralty and maritime jurisdiction extend maintenance and cure to a seaman injured on land in the course of his employment, and it is thus recognized that such jurisdiction applies to a seaman injured on land. The manner in which that recognized jurisdiction may be exercised is within the power of Congress, and there is no constitutional or logical reason why Congress may not provide a further or a different remedy for injuries both on shore and on land.

(3) The Jones Act applies to seamen a statute originally enacted for railroad employees engaged in interstate and foreign commerce. The power exercised as to seamen is equally sustainable under the commerce clause, and the grant of admiralty and maritime jurisdiction to the federal courts cannot be construed or applied as a restriction upon the commerce power of Congress.

Respectfully submitted,

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Supreme Court of the United States

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GREAT LAKES DREDGE AND DOCK COMPANY,
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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 127 Federal Reporter, 2d., 901. The opinion is also printed in full in the record (R. 16-19).

Jurisdiction.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code (U. S. Code, Title 28, sec. 347). The Circuit Court of Appeals has in this case "decided an important question of federal law which has not been, but should be, settled by this Court." (Supreme Court Rule 38 (5) (b).)

Judgment was entered in this case by the United States Circuit Court of Appeals on May 22, 1942 (R. 19).

Statement of the Case.

There are no controverted issues of fact in this case. No answer was filed by respondent, and the facts alleged in the complaint are admitted (R. 7). Count I of the complaint alleged that petitioner O'Donnell had a cause of action under the Jones Act (U. S. Code, Title 46, sec. 688) for an injury incurred on shore while in the course of his employment under the orders and directions of the master of the vessel (R. 1-4). He was at the time a member of the crew of a vessel engaged in transportation of sand on Lake Michigan from Indiana to Illinois, and he was sent ashore to aid in an emergency repair of machinery for unloading in Illinois the cargo brought from Indiana. The motion by respondent to dismiss this count alleges that the Jones Act applies only to cases of injury sustained on navigable water (R. 6). This position was sustained by the courts below (R. 6, 16-18).

Petitioner's right to an admiralty remedy of maintenance and cure was set out in Counts II and III of his complaint, and was fully recognized by respondent and by the lower courts in the present case; but relief was denied to him under the Jones Act on the ground that admiralty jurisdiction limits that act to injuries on navigable waters.

There is no doubt (1) that O'Donnell was a seaman; (2) that at the time of the injury he was "in the course of his employment" as such, as provided by the Jones Act; (3) that at the time of the injury he was performing services as a seaman, under orders of the master of the vessel which he was under duty to obey; and (4) that his duties, and his specific employment at the time of the injury, were in "furtherance of interstate or foreign commerce" and "directly" affected such commerce within the terms of the

Federal Employers' Liability Act. The only issue is that as to whether the Jones Act of 1920, in applying the Federal Employers' Liability Act to seamen, limited this application to injuries on navigable waters, although the act is in terms applicable to all injuries "in the course of his employent", (U. S. Code, Title 46, Sec. 688), and although the act so made applicable to seamen extends to any railroad employee "any part of whose duties as such employee shall be the furtherance of interstate or foreign commeree; or shall, in any way directly or closely and substantially, affect such commerce" (U. S. Code, Title 45, Sec. 51).

Your petitioner takes the position that the Jones Act in terms applies to seamen both on water and on land, while engaged in the course of their employment; that so to construe it avoids serious confusion as to facts in many cases, and as to the nature of the remedy; and that there is full authority in Congress to enact such a statute, both under the commerce power and under the power to enact legislation in amendment of the maritime law.

Errors Relied Upon.

The United States Circuit Court of Appeals erred in holding that the Jones Act applies only to injuries incurred on navigable waters. The Court further erred in basing this view upon the ground that the act is so limited by the scope of admiralty jurisdiction under the constitution; and it further erred in declining to consider the argument that the application of the act to injuries incurred ashore is within the power of congress under the commerce clause of the constitution.

ARGUMENT.

I.

The Jones Act Gives a Remedy to "Any Seaman Who Shall Suffer Injury in the Course of His Employment", Without Any Restriction as to Where the Injury Is Suffered.

Section 33 of the Merchant Marine Act of 1920, otherwise known as the Jones Act, provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representatives of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (U. S. Code, Title 46, Sec. 688.)

This statute applies to seamen "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees". This makes applicable to seamen the Federal Employers' Liability Act (U. S. Code, Title 45, Secs. 51-60). Before its amendment in 1939, the Employers' Liability Act applied only to injuries suffered while the employee was engaged in duties in interstate or foreign commerce. The scope of the act was extended in 1939 to include any employee "any part of whose duties as such employee shall

be the furtherance of interstate or foreign commerce or shall in any way directly or closely and substantially affect such commerce" (U. S. Code, Title 45, Sec. 51). The 1939 amendments to the Federal Employers' Liability Act are applicable to seamen by virtue of the language of the Jones Act. But even if such amendments were not applicable, the services rendered by O'Donnell were services in interstate commerce under the terms of the statute before its amendment in 1939.

In as clear language as is possible, the Jones Act is made applicable to injuries incurred by a seaman "in the course of his employment". There is no limitation as in the Longshoremen's and Harbor Workers' Act which applies "only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock)". U. S. Code, Title 33, Sec. 903. If a limitation to navigable water is present in the Jones Act, it must be found by judicial construction. And in such construction it must be remembered that: "The legislation was remedial, for the benefit and protection of the seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it." *The Arizona* v. *Anelich*, 298 U. S. 110, 123. Seaman are wards of admiralty as to their injuries, wherever incurred.

The Congressional intent appears clear, although it has, to the present, been defeated by judicial construction. The Jones Act, section 33 of the Merchant Marine Act of 1920, was an amendment to section 20 of the Seamen Act of 1915, which moderated the fellow-servant rule as to "any injury sustained on board vessel or in its service". The phrase, "or in its service" clearly included injuries other than those "on board vessel". The amendment of this section through the Jones Act was clearly intended to widen, rather than to narrow, both the remedy and the scope of its application. The broader words "in the course of his employment" replaced the words "on board vessel

or in its service". At the time these words were inserted into the statute, they had received construction in state workmen's compensation statutes. "An injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform." *McNicol's Case*, 215 Mass. 497, 498, 102 N. E. 697 (1913). There is no doubt that a seaman may be required to perform duties on land, for otherwise a stevedore's employees could not have been held to be within the act. And the seaman cannot refuse to perform dangerous services on land, when commanded by the master of the vessel, as in the present case. This Court properly said in *Southern S. S. Co.* v. *National Labor Relations Board*, 62 S. Ct. 886, 890 (1942):

> "The lives of passengers and crew as well as the safety of ship and cargo are entrusted to the master's care. Everyone and everything depend on him. He must command and the crew must obey. Authority cannot be divided."

A similar statement is found in *Johnson* v. *The Cyane*, Fed. Cas. No. 7381.

The phrase "in the course of his employment" applies the act to injuries in the course of such employment, wherever incurred. And the use of the word "seaman" does not restrict the application of the act to navigable waters. Section 713, Title 46 of the United States Code, defines a "seaman" as a person "who shall be employed or engaged to serve in any capacity on board" a vessel. This definition is one intended to distinguish a seaman from a master, and this Court has held that the term "seaman" as used in the Jones Act includes both seaman and master. It has also explicitly held that the definition of seamen in section 713 does not apply to or restrict the Jones Act. *Warner* v. *Goltra*, 293 U. S. 155.

That the term "seaman" as used in the Jones Act is not narrowly construed to apply to those performing duties

only on the vessel is also indicated by decisions holding that a stevedore's employees were subject to the act, although their duties were largely on shore. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Buzynski* v. *Luckenbach S. S. Co.*, 277 U. S. 226.

Section 713 does not limit the term seamen to service aboard a vessel; and, if it did so, a clearly different meaning is shown in the Jones Act. It applies to "any seaman who shall suffer personal injury in the course of his employment".

The language of the Jones Act gives no support to the argument that it is limited to injuries on navigable waters. No such limitation is found in the statute, and, in fact, such a limitation is avoided. To read it into the statute is to engage in judicial legislation. It cannot be said that a seaman ceases to be a seaman "in the course of his employment" when he performs duties on shore in the course of his employment and under orders from the master of his vessel.

But another method has been found to restrict the language of the Jones Act. The statute contains no explicit statement that it applies to a seaman's injuries on land, though it does explicitly apply to all places where he may perform services "in the course of his employment". The remedy of the seaman under the Jones Act is "at his election", and this necessarily implies the existence of another or alternative remedy which may be abandoned. The seaman is permitted to elect this remedy as against any other possible remedy. The remedies (other than maintenance and cure), available to seamen for personal injuries before the passage of the Jones Act were (1) that of unseaworthiness in cases arising in navigable waters and (2) that of suit or compensation under state laws if the injury was not incurred in navigable waters. Under the language of the act, the seaman may choose the remedy under the Jones

Act instead of the alternative federal or state remedy if the injury was suffered "in the course of his employment", either on land or water. Congress is presumed to have known of existing remedies in both federal and state courts, particularly in view of the fact that it was providing a remedy in both courts.

But the controlling view heretofore taken by the courts, is that there was no clear intention to extend jurisdiction to injuries on shore, and that such jurisdiction therefore does not exist under the Jones Act. The first statement of this view, and that subsequently regarded as controlling by other courts, is in *Hughes* v. *Alaska S. S. Co.*, (District Court W. D. Washington N. D., March 7, 1923), 287 Fed. 427, 428:

> "The use of the expression 'at his election' shows that the remedy granted by Section 33 for a tort is an alternative one to that already possessed by the seaman for his injury—the remedy of care and maintenance and wages to the end of the voyage, where he is injured in the service of the ship and for full indemnity in case the ship was unseaworthy. No intention is shown by Section 33 to include in the new remedy any cases, in so far as territorial jurisdiction is concerned, not covered by the old."

This statement is erroneous in several respects. Maintenance and cure is not an alternative but an additional remedy. *Pacific Steamship Co.* v. *Peterson*, 278 U. S. 130, 139. And maintenance and cure have applied to injuries on shore since the Laws of Wisbuy. Mr. Justice Story in *Reed* v. *Canfield*, 1 Sumn., 195 (1832), 20 Fed. Cas. 427 (No. 11,641); Mr. Justice Brown in *The Osceola*, 189 U. S. 158; *Benedict's American Admiralty*, 6th Ed., sec. 27, page 61. If maintenance and cure were an alternative remedy, this would convincingly show a jurisdiction extending beyond navigable waters, and it does establish that the constitutional grant of admiralty jurisdiction extends beyond such waters in the care of seamen. Moreover, the *Hughes*

case completely disregards the fact that the election of remedies provided by the Jones Act applies to remedies under both federal and state laws.

In *Soper* v. *Hammond Lumber Co.*, 4 Fed. (2d), 872 (1925), the Court said, with respect to the Jones Act:

> "The clear intent and purpose of the section was to give him [the seaman] a right which he did not possess before—namely, an election to pursue a common law remedy if he were injured on board ship * * *. He never was so deprived or so restricted for injuries occurring on shore."

The Court said in the *Soper* case that ambiguous language in remedial legislation is to be construed in the light of the mischief to be cured, and that the mischief was the deprivation of right to trial by jury in maritime cases. But there is no ambiguity here, and the purpose of the Federal Employers' Liability Act was to establish certain new and uniform standards. The Jones Act made the Federal Employers' Liability Act applicable to seamen, and the purpose of that act was to cure the defect of common law defenses. In the *Soper* case, as in the *Hughes* case, there is a complete failure to recognize that a remedy may be sought under the Jones Act as an alternative to a remedy under state law, and that this remedy applies to any injury incurred by a seaman "in the course of his employment". The clear intent of the Jones Act was not only to give a right to a common law remedy and a jury trial, but to give such a remedy in both state and federal courts under more favorable conditions to any seaman who had an alternative remedy in either state or federal courts.

The error in the *Soper* case is in the assumption that if the seaman on navigable waters is given a common law remedy together with the removal of common law defenses, he is on the same basis as the seaman performing the same duties on shore, who, if the Jones Act were not applicable, would be subject to the varying state statutes as to common law defenses or workmen's compensation.

Referring to the *Hughes* case, *Benedict's American Admiralty*, 5th Ed. (1925), Vol. 1, page 32, says as to the Jones Act:

> "The Act of Congress has been held inapplicable to an injury sustained by the seaman while working on a pier, but assuredly the intention of Congress was to annex the remedy to the contract of employment and not to confine it, as if independent of contractual relation, within the bounds of maritime tort, particularly as the remedy is given at law."

But the controlling view is in accord with that of the *Hughes* and *Soper* cases. And some weight has been given to the fact that the Circuit Court of Appeals for the Third Circuit took the position that the Jones Act did not apply to seamen's injuries on land, and that this Court denied certiorari. *O'Brien* v. *Calmer S. S. Corporation*, 104 Fed. (2d), 148; Certiorari denied, 308 U. S. 555. "But, 'The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times'." *United States* v. *Carver*, 260 U. S. 482, quoted in *Atlantic Coast Line R. R. Co.* v. *Powe*, 283 U. S. 401.

The opinions of circuit courts of appeal and of district courts have been unanimous, and have been primarily influenced by implications from this Court that any other view would exceed the admiralty and maritime jurisdiction conferred upon federal courts by the constitution.

II.

The Constitutional Vesting of Admiralty and Maritime Jurisdiction in the Federal Courts Authorizes Congress to Prescribe Remedies for Injuries to a Seaman "in the Course of His Employment", Whether on Land or on Navigable Waters.

The constitutional vesting in federal courts of "all cases of admiralty and maritime jurisdiction" carries with it the

power of Congress to legislate on the same subject. *Ex parte Garnett*, 141 U. S. 1. This includes a power to alter maritime law and to create new remedies which were unknown to that law.

In *Crowell* v. *Benson*, 285 U. S. 22, the Court was dealing with the Longshoremen's and Harbor Workers' Act which is specifically limited to injuries on navigable waters. Mr. Chief Justice Hughes said at page 55:

> "In amending and revising the martime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction."

Cases were cited in support of this statement; and a statement of similar import by Mr. Chief Justice Hughes appears in *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647. In neither case were the statements necessary to the decision, and the question whether they correctly state the law is for determination by this Court.

The phrase "admiralty and martime jurisdiction" deals with a field of operation and is not limited to the specific rules or specific methods of relief which may once have been, or which may still continue to be, employed. The field of operation is one of navigation, and the Congress has a continuing authority to alter the rules which are to be applied. Mr. Justice Bradley in *New England Marine Insurance Co.* v. *Dunham*, 11 Wall. 1 (1871) said:

> "This Court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as that of England."

The Court has found it necessary not to adhere to unreasonable and unworkable restrictions upon admiralty jurisdiction. In sustaining a statute conferring jurisdiction to entertain a mortgage foreclosure suit under the Ship Mortgage Act of 1920, Mr. Chief Justice Hughes said in *Detroit Trust Co.* v. *Barlum*, 293 U. S. 21, 52:

> "The authority of the Congress to enact legislation of this nature was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters. *The Genesee Chief* v. *Fitzhugh*, 12 How. 443, 13 L. ed. 1058, overruling *The Thomas Jefferson*, 10 Wheat. 428, 6 L. ed. 358."

With reference to an issue not dissimilar from that in the present case, Mr. Justice Brown, concurring, said that the Court was properly abandoning "the distinction between damage done to fixed and to floating structures." The opinion of the Court, by Mr. Justice Holmes, disregarded dicta of this Court and a number of decisions of inferior federal courts, saying that "the constitution does not prohibit what convenience and reason demand." *United States* v. *Evans*, 195 U. S. 361.

But here we need no abandonment by this Court of a prior view as to the scope of jurisdiction. Any matter within the scope of maritime regulation is within admiralty and maritime jurisdiction, and seamen in the course of their employment are within that jurisdiction. Injuries to seamen on land in the course of their employment have been within that jurisdiction as to maintenance and cure since the Laws of Wisbuy and it is for Congress to determine whether there shall be other or additional remedies than maintenance and cure, in the exercise of that juris-

diction. The jurisdiction conferred by the constitution extends to the regulation of maritime transactions, and is not limited by the time, manner or place of such transactions, unless such limitation is read into the constitution by this Court. There is no constitutional basis for a contention that maintenance and cure are within admiralty jurisdiction as to injuries on shore, but that Congress has no power to determine the conditions of a concurrent personal injury suit for the same injury.

The constitution grants admiralty and maritime jurisdiction without restrictions; and this grant cannot be construed, with respect to the same injury, to include a remedy arising out of contract, and to deny the power to create or alter a remedy arising out of tort. And even if this grant of jurisdiction could be so construed, the remedy prescribed by Congress through the Jones Act may be treated as contractual, that is, as giving the same type of remedy as maintenance and cure. Benedict's *American Admiralty*, 5th Ed. (1925), Vol. I, page 32, quoted previously in this brief. To deny the power of Congress is not to deny jurisdiction, but is to seek to control the discretion of Congress in enacting laws within a field of its authority.

Congress has power to replace or supplement the existing admiralty remedy of maintenance and cure for injuries sustained both on land and on water. Authority to substitute remedies in admiralty has been definitely recognized by this Court, and the fact that such recognition involved a statute limited to injuries on navigable waters does not limit the scope of recognized power, which is equally broad in the whole field of admiralty and maritime jurisdiction. In *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 256, the Court properly said that "no doubt was entertained of the power of Congress to modify the admiralty law and to provide for the payment by employers of compensation." Such modification may either supplement or enlarge existing remedies, or, as in this case, may, on elec-

tion, replace any existing supplementary remedy under state law. The whole of the injury on land is within admiralty jurisdiction; not merely the maintenance and cure remedy for the injury; and through such jurisdiction an exclusive or supplementary or elective remedy may be provided by federal statute.

There is jurisdiction in admiralty over the person of the seaman "in the course of his employment"; there is jurisdiction over the subject of his injury "in the course of his employment"; and the constitutional scope of admiralty and maritime jurisdiction properly includes all aspects of such injury.

III.

The Grant of Admiralty and Maritime Jurisdiction to the Federal Courts Does Not Restrict the Power of Congress to Regulate Interstate and Foreign Commerce. The Power of Congress to Provide Remedies for Injuries to Seamen Is Not More Restricted Than That With Respect to Railroad Employees.

The granting of admiralty jurisdiction to the federal courts does not constitute a restriction upon the commerce power, although Mr. Chief Justice Taney expressed the view that Congress could not enlarge the jurisdiction to suit the wants of commerce (*Genesee Chief* v. *Fitzhugh*, 12 How. 443), and although this Court spoke more recently of an "exclusive" admiralty and maritime jurisdiction controlling "a car float in navigable waters". *Nogueira* v. *New York, N. H. & H. R. R. Co.*, 281 U. S. 128, 134. The statement in the *Genesee Chief* case was not necessary to the decision, and the *Nogueira* case involved the Longshoremen's and Harbor Workers' Compensation Act which is explicitly limited to navigable waters (including any dry dock), and which was held expressly to replace the Federal Employers' Liability Act by another and exclusive remedy

accorded a railroad employee engaged in maritime employment on navigable waters. The *Nogueira* case impliedly recognizes that there was power under the commerce clause to make the seaman employed on navigable waters as the employee of a railroad carrier subject to the Federal Employers' Liability Act, but at the same time recognizes that this remedy had been withdrawn by the statutory s bstitution of another and exclusive remedy. *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, 213, clearly recognized the power of Congress to apply to vessels the statutory remedies adopted as to railroads in interstate commerce, although construing the word "boats" in the statute as limited "to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice". Within this definition of boats, the Federal Employers' Liability Act covered seamen employed by railroads, whether injured on land or water, until such operation was restricted by the Longshoremen's and Harbor Workers' Act. See *Erie R. Co.* v. *Jacobus*, 221 Fed. 335; *The Erie Lighter*, 250 Fed. 490. If a statute based upon the commerce power could provide a remedy for seamen employed by railroads and injured on either land or water, certainly the commerce power can be construed to sustain a statute which provides an additional remedy for seamen injured on land as well as on navigable water. No limitation upon such legislation can be found in the admiralty and maritime jurisdiction, but, if there were, the legislation is fully sustainable under the commerce clause. And there is, of necessity, a close interrelation of the commerce clause and of admiralty jurisdiction.

A particular power or authority may be found to exist "upon a just and fair interpretation of the whole constitution". *Julliard* v. *Greenman*, 110 U. S. 421, 448.

The construction of the Jones Act by inferior federal courts is based upon the theory that, because of limitations

upon admiralty jurisdiction, employees in interstate or foreign commerce by navigation cannot be given the same remedies as employees in interstate commerce by railroads, if they are injured on land. A restriction is therefore read into the statute, although it does not in fact exist. This Court has not held, and cannot be expected to hold, that the commerce power is more restricted as to navigation than as to transportation on land.

The power indirectly vested in Congress as an incident to admiralty jurisdiction of the federal courts does not conflict with the directly granted commerce power. The two powers supplement each other. Speaking for the Court with respect to admiralty law, Mr. Justice Bradley properly said in *The Lottawanna*, 21 Wall. 558, 577:

> "It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress, undoubtedly, has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law, and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of the ground covered by the former."

The power of Congress under the Commerce Clause "comprehends navigation within the limits of every state in the union, so far as that navigation may be, in any manner, connected with commerce with foreign nations, or among the several states, or with the Indian tribes". *Gibbons* v. *Ogden*, 9 Wheat. 1, 197.

The scope of federal control of navigation under the commerce clause was recently discussed in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, in which the Court said, at pages 404, 426:

> "The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the constitution. • • • It was held early in our history that the power to regulate commerce necessarily included power over navi-

gation. * * * Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control."

And in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 525, the Court said that:

"We have recently recognized that 'flood protection, watershed development, recovery of the cost of improvements through utilization of power are parts of commerce control'. *United States* v. *Appalachian Electric Power Co. supra.* And we now add that the power of flood control extends to the tributaries of navigable streams."

Certainly the power with respect to navigation and over those employed in navigation is no less than that granted with respect to railways and railway employees. The jurisdiction conferred on federal courts in admiralty cases carries with it a power in Congress to amend the admiralty law, but the fact that this power exists independently of the commerce clause does not restrict that clause.

That the commerce power includes a power to regulate remedies for injuries to workmen is fully established by the *Second Employers' Liability Cases*, 223 U. S. 1; that the power extends to "back-shop" workers is established by *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515; and that it extends to all labor relations incident to interstate and foreign commerce is clearly shown in *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1, and *United States* v. *Darby*, 312 U. S. 100. That these regulatory powers apply to seamen is indicated in *National Labor Relations Board* v. *Waterman Steamship Corporation*, 309 U. S. 206.

With respect to the application of the Jones Act under the commerce clause, it should be borne in mind that the purpose of the act was to apply to seamen an act already applicable to railway employees, and that the Federal Employers' Liability Act was based on the commerce clause.

It may be urged, however, that the term "seaman" as used in the Jones Act includes persons not properly within the terms of the commerce clause. But the Jones Act applies to seamen all statutes "modifying or extending the common law right or remedy" of railroad employees, and the Federal Employers' Liability Act as amended in 1939 applies the remedy to any employee of a carrier any part of whose duties as such employee shall be "the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce". If a seaman could be found who was not within these provisions, he could be said not to be within the terms thereof, unless it should be held, as it might properly be under the *Darby Case*, that the commerce clause applies to any person or vessel engaged in navigation who or which "may or will be" carrying articles in interstate or foreign commerce. There is a possibility that every vessel upon navigable waters "may" so carry articles.

Conclusion.

An unnecessary and confusing situation is created, both in the construction of a statute and in the remedies of the seaman, if the seaman engaged in duty on a vessel is entitled to recover under this Act, but is denied recovery if, under orders of the master of the vessel, he performs similar duties on shore "in the course of his employment". No such distinction is found in the statute. In fact, such a distinction is avoided, and to read it into the statute is to engage in judicial legislation. It cannot be said that a seaman ceases to be a seaman "in the course of his employment" when he performs duties on shore in the course of his employment and under orders from the master of his vessel.

Uniformity is of the essence of admiralty jurisdiction (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149); but for

such uniformity the courts have substituted diversity and confusion.

The seaman, and particularly the seaman on non-tidal waters, will often have duties on shore, as well as on the navigable waters. He will often be engaged in the two types of duties on the same day. And in many cases there will be difficulty in determining whether an injury was incurred on the vessel or on land. This problem was faced in *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647, and *The Admiral Peoples*, 295 U. S. 649. There was no intent that he should have a different remedy, and a material difference in the amount of possible recovery if injured in the performance of duties on land similar to those on the vessel; or that, in case of doubt as to whether the injury was occasioned on the vessel or on land, he should be required to make his choice, subject to the possibility that a mistake in choice may occasion a delay that will deprive him of any remedy.

The 1939 amendment to the Federal Employers' Liability Act was intended to avoid similar uncertainty and confusion occasioned by the previous provision in that statute limiting it to injuries incurred by a railroad employee "while he is employed by such carrier in such commerce". Under the view of the court this required that the employee at the time of injury be "engaged in interstate transportation or in work so closely related to it as to be practically a part of it". *Chicago & North Western Ry. Co.* v. *Bolle*, 284 U. S. 74. By the amendment of 1939, the employee is not required to show that he was engaged in an interstate commerce transaction at the time of the injury, but the act applies to an employee "any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially affect such commerce". U. S. Code, Title 45, section 51.

The purpose of the 1939 amendment to the Federal Em-

ployers' Liability Act is indicated in Report 661 of the Senate Judiciary Committee in the 1st Session of the 76th Congress (1939). The amendment removes the restriction on place and character of the service being rendered at the time of the injury; and in view of the fact that it is a part of the statute now applicable to seamen, it strengthens the intent which is already clear from the face of the Jones Act that it applies to all injuries incurred by a seaman "in the course of his employment", irrespective of place.

Respectfully submitted,

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